APPENDIX A

UNITED STATES COURT OF APPEALS

[Filed Oct. 28, 2002]

No. 01-10808

KENNETH D. SANDSTAD,
Plaintiff-Appellant,

v.

CB RICHARD ELLIS, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas.

Before DUHÉ, DeMOSS and CLEMENT, *Circuit Judges.*

DUHÉ, *Circuit Judge*:

Plaintiff-Appellant Kenneth Sandstad appeals from the district court's order granting Defendant-Appellee C.B. Richard Ellis, Inc. summary judgment on Sandstad's Age Discrimination in Employment Act claim. Because Appellant has not produced evidence sufficient to create an issue for the jury as to pretext, we AFFIRM.

I. BACKGROUND

Sandstad ("Appellant") began his career with C.B. Richard Ellis ("Appellee" or the "Company"), a real estate services company, as sales manager of the Minneapolis office in 1974. Over the next 16 years he was promoted to Vice President and Resident Manager of the Minneapolis office, First Vice President and Resident Manager of the North Dallas

office, and South Central Regional Manager of the Brokerage Business Unit.

The Brokerage Business Unit was organized in three divisions, and in 1990, Appellant became Central Division Manager. He reported directly to then President of Brokerage Services Gary Beban ("Beban") until the end of 1994, when his Division was eliminated and he became Senior Executive Vice President of Institutional Services. This was also an upper management position, and Appellant reported to Dick Clotfelter ("Clotfelter"). In late 1995, Clotfelter gave Appellant a poor performance review, questioning his management and noting his failure to focus on essential tasks. In 1996, Appellant returned to the Brokerage Business Unit as Eastern Division Manager, again reporting to Beban.

Beginning in 1996, the Company designed and implemented a Long-Term Leadership Orientation Program (the "Plan") to integrate younger employees into senior management. A 1997 memo issued by then CEO James Didion ("Didion") described the Plan as one to "identify 30 to 50 younger managers and management candidates to serve as a pool of talent for promotion to senior management over the next 5+ years, ultimately replacing senior management." Brett White, who eventually replaced Gary Beban as President of Brokerage Services and who terminated Appellant, was a participant of this program.

Appellee became a publicly traded company in late 1996. Appellee prepared question-and-answer literature for road shows held in anticipation of the public offering.[1] The literature described the Company's plan to integrate younger employees into management. During the road shows, stock

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[1] "Road show. A series of presentations to investors describing an upcoming issue of securities. A road show is designed to drum up interest in the issue among potential investors." DAVID L. SCOTT, WALL STREET WORDS 326 (Revised ed. 1997).

analysts remarked to Company representatives that there was "too much grey hair" in senior management. Among the representatives who heard these comments was Walter Stafford, senior manager and General Counsel for the Company. Stafford told other senior managers about the remarks and stated that something would have to be done to remedy the analysts' perception. Stafford was among the managers who later decided to fire Appellant.

In 1997, Beban moved from President of Brokerage Services to President of Corporate Services. Appellant was in line to fill the vacancy left by Beban; however, CEO James Didion instead selected Brett White, who was 37 years old at the time he was promoted. Beban told Appellant that Didion had decided to "skip a generation" in selecting Beban's replacement.

In early 1998 the Brokerage Business Unit was reorganized from three divisions into nine regions. Appellant was assigned the lead management role in the South Central Region. Soon thereafter, two managers who reported directly to Appellant registered their frustration with Appellant's management. In July 1998, White, in his role as President of Brokerage Services, gave Appellant's management of the Dallas market a negative review. The next month, Nina Petty ("Petty"), a manager who reported directly to Appellant, filed a formal written complaint of gender discrimination against Appellant.

Appellee hired Rogge Dunn ("Dunn") as outside counsel to investigate Petty's complaint. Dunn interviewed Appellant, Petty, and other employees in Appellant's region, and compiled a report that included summaries of the interviews he conducted. Dunn reported that employees complained about Appellant's conduct and management style generally. His own impression of Appellant was that Appellant was a "bully," was condescending, and was not credible during his interview. Dunn concluded that while he thought Appellant

had not discriminated against Petty, Appellant's actions with regard to Petty were nonetheless inappropriate and placed Appellee at substantial risk of a jury verdict.

Walter Stafford, after meeting with senior managers Ray Wirta and James Didion, recommended Appellant's discharge to White. White conferred briefly with the Company's legal department and discharged Appellant shortly thereafter. White told Appellant that the reasons were poor performance and lost confidence in his leadership. At the time, Appellant was age 52. The region under Appellant's direction was combined with a region managed by Jeff Langdon, age 42.

White issued a memorandum announcing the discharge to the employees in Appellant's region. The memorandum described the reason as lost confidence in Appellant's ability to perform following the investigation prompted by agender discrimination complaint lodged against Appellant.

Appellant sued under the Age Discrimination in Employment Act and timely appealed the adverse grant of summary judgment.

II. STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *Pratt v. City of Houston, Tex.*, 247 F.3d 601, 605-06 (5th Cir.2001). Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). An issue of material fact is genuine if a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). In reviewing the evidence, we must draw all reasonable inferences in favor of the nonmoving party, and avoid credibility determinations

and weighing of the evidence. *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000). In so doing, we must disregard all evidence favorable to the moving party that the jury is not required to believe. *Reeves*, 120 S.Ct. at 2110.

III. ANALYTICAL FRAMEWORK FOR ADEA CASES

In employment discrimination cases, a plaintiff may present his case by direct or circumstantial evidence, or both. *Russell v. McKinney Hospital Venture*, 235 F.3d 219, 222 (5th Cir.2000). If the plaintiff produces direct evidence that discriminatory animus played a role in the decision at issue, the burden of persuasion shifts to the defendant, who must prove that it would have taken the same action regardless of discriminatory animus. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252_53, 109 S.Ct. 1775, 1792, 104 L.Ed.2d 268 (1989). If the plaintiff produces only circumstantial evidence of discrimination, the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) guides our inquiry.[2]

The McDonnell Douglas framework first requires satisfaction of the prima facie case, the elements of which, in the context of age discrimination, are: (1) the plaintiff was discharged; (2) he was qualified for the position at issue; (3) he was within the protected class; and (4) he was replaced by someone younger or outside the protected group. *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 654 (5th Cir.1996). Upon plaintiff's satisfaction of the prima facie case, the burden of production, rather than persuasion, shifts to the defendant to proffer a legitimate nondiscriminatory reason for its decision. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817; *Tex.*

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[2] This circuit applies the *McDonnell Douglas* rubric to both Title VII and ADEA claims. *See Russell v. McKinney Hospital Venture*, 235 F.3d 219, 222 n. 3 (5th Cir.2000).

Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255_56, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). If the defendant meets its burden, the presumption of discrimination created by the prima facie case disappears, and the plaintiff is left with the ultimate burden of proving discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511_12, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

The plaintiff may meet its ultimate burden with evidence tending to show that the reason offered by the defendant is a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 804, 93 S.Ct. at 1825. Evidence demonstrating the falsity of the defendant's explanation, taken together with the prima facie case, is likely to support an inference of discrimination even without further evidence of defendant's true motive. *Reeves*, 530 U.S. at 147-48, 120 S.Ct. at 2108-09. Thus, the plaintiff can survive summary judgment by producing evidence that creates a jury issue as to the employer's discriminatory animus or the falsity of the employer's legitimate nondiscriminatory explanation.[3]

IV. APPLICATION OF ANALYTICAL FRAMEWORK

Appellant urges that the district court erred in finding that he offered no direct evidence of Appellee's discriminatory motive in terminating him. We agree with the district court. Direct evidence is evidence that, if believed, proves the fact of discriminatory animus without inference or presumption.

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[3] The district court quoted *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 268 (5th Cir.1994), for the proposition that the plaintiff's burden of establishing pretext is "a heavy one indeed. It is not discharged by general avowals of belief, however sincere, that age—rather than an established adequate reason—was the real reason for the termination." Appellant protests that the language quoted by the district court indicates that it applied the "pretext-plus" standard rejected in *Reeves*. Our holding does not rely on the notion of Appellant's burden being a heavy one. In accordance with *Reeves*, we look only to whether a reasonable jury could find that Appellant's evidence supports an inference of age discrimination.

Mooney v. Aramco Services Co., 54 F.3d 1207, 1217 (5th Cir.1995). Appellant points to the Long Term Leadership Development Plan, which endeavored to "identify ... younger managers . . . for promotion to senior management over the next 5+ years, ultimately replacing senior management." To find that the plan is evidence of age-based animus relevant to Appellant's termination requires the inference that senior managers were to be fired to make room for younger trainees, rather than being replaced as they retire, change jobs, or are terminated for performance reasons.[4] Appellant contends that the district court erroneously failed to draw this inference in his favor. However, Appellant's contention is inapposite to the analysis of whether evidence is direct or circumstantial. If an inference is required for the evidence to be probative as to Appellee's discriminatory animus in firing Appellant, the evidence is circumstantial, not direct.

Next, Appellant offers the remarks by stock analysts about "too much grey hair" in Company management. This evidence cannot demonstrate directly that Appellant was fired because of his age. The speakers not only had no part in the decision to terminate Appellant, they were not even employed by the Company. Gary Beban's "skipping a generation" comment similarly is not direct evidence. First, Beban was not responsible for Appellant's termination. Second, Beban in his deposition testimony indicated that he meant "generation" in the context of levels of management seniority, not age. The ambiguity of the remark, as well as its attenuation from Appellant's termination, excludes it from the realm of direct evidence.

Because Appellant's case consists of circumstantial evidence, we apply the *McDonnell Douglas* burden_shifting

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[4] Our discussion of the reasonableness of the required inference is reserved until we discuss whether Appellant has produced evidence allowing for the inference of pretext, *infra*.

analysis. Appellee argues that Appellant failed to make out a prima facie case because Appellee restructured its divisions rather than replacing Appellant per se. The region formerly under Appellant's direction was collapsed into a region managed by 42-year-old Jeff Langdon. As did the district court, we will view, without deciding, Appellant's evidence as establishing a prima facie case. The burden then shifts to Appellee to produce a legitimate nondiscriminatory reason for terminating Appellant.

Appellee's proffered reasons for terminating Appellant were his management style and the risk created by his conduct toward Nina Petty. Evidence in support of Appellant's explanation includes deposition testimony by the managers who fired Appellant or took part in the decision. Appellant contends that *Reeves* requires us to disregard as interested witness testimony all testimony by managers involved in the employment decision.[5] We disagree with Appellant's interpretation of *Reeves*, which would in effect eliminate his burden to show that Appellee's explanation is pretextual. The burden on Appellee to produce a legitimate nondiscriminatory reason for terminating Appellant is "one of production, not persuasion; it can involve no credibility assessment." *Reeves*, 530 U.S. at 142, 120 S.Ct. at 2106; *See also Rios v. Rossotti*, 252 F.3d 375 (5th Cir.2001) (same); *Futrell v. J.I. Case*, 38 F.3d 342 (7th Cir.1994) ("[I]n indirect discrimination cases, we do not defer to jury verdicts where the credibility of a defendant's explanation of the discharge is at

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[5] "[A]lthough the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. See Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses.' *Id.*, at 300." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 151, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000) (quoting Wright & Miller, *Federal Practice and Procedure* § 2529 (2d ed. 1995)).

issue simply because juries have the exclusive right to judge credibility.") The definition of an interested witness cannot be so broad as to require us to disregard testimony from a company's agents regarding the company's reasons for discharging an employee. As the Seventh Circuit noted in *Traylor v. Brown, et al.*, 295 F.3d 783 (7th Cir.2002), to so hold would foreclose the possibility of summary judgment for employers, who almost invariably must relyon testimony of their agents to explain why the disputed action was taken.

Moreover, the record reveals support other than the testimony of senior managers for Appellee's explanation. In Appellant's deposition and in a memo written by Appellant, he acknowledges calling Nina Petty in during her maternity leave to discuss removing her from a pure management role. Appellant admits that he regrets writing in a memo to Petty that she was regarded as a "mother hen." In a memo to Brett White, Appellant concedes that "the book" on him was that he micro-managed those who reported to him. The record contains memoranda expressing dissatisfaction with Appellant's management style from managers Ran Holman and Jerry Lumsden, both of whom reported to Appellant. The performance review of Appellant by Brett White, written the July before Appellant's September termination, expresses White's concern with the "instability and dissatisfaction" among the management in the Dallas market.

Also supporting Appellee's explanation are the summaries written by Rogge Dunn after he investigated Petty's complaint. While the summaries could not be admitted for their truth, we consider them only for their effect on Appellee's decision. Appellant's assertion that we must assess the truth of the interview summaries to determine Appellee's reasonableness in relying on them does not create a fact issue as to pretext; Appellee is entitled to be unreasonable so long as it does not act with discriminatory animus. If Appellant intends to show that the explanation is so unreasonable that it must

be pretextual, it is Appellant's burden to proffer evidence creating a fact issue regarding reasonableness. Appellant has not done so.

Given Appellee's nondiscriminatory explanation, Appellant must point to evidence creating an issue of fact as to the pretextual nature of the explanation. Merely disputing Appellee's assessment of his performance will not create an issue of fact. *Evans v. City of Houston*, 246 F.3d 344, 355 (5th Cir.2001). The issue at the pretext stage is whether Appellee's reason, even if incorrect, was the real reason for Appellant's termination. *Id.* Thus, Appellant must adduce evidence supporting an inference that Appellee's motive was age_based animus, or at the least, that Appellee's explanation of its motive is false.

In arguing that Appellee's explanation is pretextual, Appellant points to Rogge Dunn's conclusion that Appellant did not discriminate against Petty. However, Appellant fails to note Dunn's additional conclusion that Appellee nonetheless placed the Company at substantial risk of a jury verdict. That Appellant did not discriminate against Petty is insufficient to create an issue of fact regarding whether Appellee fired him because he posed a risk to the Company.

Appellant argues that the oral statements we reject as direct evidence in any event provide evidence of discrimination sufficient to show pretext. Oral statements constitute evidence of discrimination if they indicate age-based animus and the speaker is principally responsible for the plaintiff's firing. *Russell v. McKinney Hospital Venture*, 235 F.3d 219 (5th Cir.2001) (citing *Reeves*, 530 U.S. at 151, 120 S.Ct. at 2110).[6]

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[6] This court traditionally has applied the four-part test of *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir.1996), to workplace remarks. In *Russell*, a panel of this court chose not to apply the *CSC Logic* test, noting that its harsh application in *Reeves* was unacceptable to the Supreme Court.

The statements offered by Appellant fail in that the speakers were not responsible, primarily or otherwise, for his termination. The comment by Gary Beban that James Didion had "skipped a generation" in choosing Beban's replacement could indicate age-based animus, and we draw that inference in favor of Appellant. However, Beban was not among the managers who made the decision to fire Appellant. Beban's estimation of Dideon's decision_making process in promoting Brett White bears no logical link to the decision to fire Appellant.

The remarks by stock analysts that the Company had "too much grey hair" in management indicate age based animus. However, the link between the speakers, who were not even Company employees, and Appellant's termination is absent. To indicate a connection between the analysts' remarks and his termination, Appellant points out that Walter Stafford, one of the managers responsible for Appellant's firing, was audience to the comments and later expressed concern about them. We have held that a remark may bear a sufficient causal connection to the employment decision if the speaker has such influence over the decision maker that his animus properly may be imputed to the decision maker. *Russell*, 235 F.3d at 226_27, citing *Haas v. ADVO Sys., Inc.*, 168 F.3d 732, 734 n. 1 (5th Cir.1999). These decisions are based in part on principles of agency. *Long v. Eastfield College*, 88 F.3d 300, 306 (5th Cir.1996). We have not held that the remarks of non-employees may be imputed to the decision maker, and the statement at issue here provides no reason to so hold today.

Appellant's only evidence of discriminatory remarks by a decision maker is Stafford's testimony that White said to him,

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Russell, 235 F.3d at 225-26. Because the evidence offered by Appellant would produce the same result under either test, we do not reach whether the *CSC Logic* approach continues to be viable.

"You old guys don't always get it right." Appellant omits from his argument the portion of the exchange which places it in context:

Q: Can you recall any [remarks] specifically?
A: The specifics, no. But, again, they're of the same type: "you old guys don't always get it right."
Q: He has said that?
A: Uh-huh.
Q: When did you hear him say that?
A: After I told him that, "You young guys seldom get it right." [7]

Viewed in context, White's remark provides no evidence of discriminatory animus.

The Plan likewise does not provide evidence of pretext. Favoring Appellant, we accept that the Plan evidences a policy of keeping older employees from advancing to senior management positions. However, the inference that the Plan reflected a policy to fire older managers to make room for younger managers is both unreasonable and contradicted by independent, uncontroverted evidence. Appellant offers the decline in mean age of senior managers as evidence of the Company's age-based animus. Since implementation of the Plan, two senior managers have been fired: Appellant and one other, whom Appellant concedes was not fired because of his age. The record shows that younger employees have been promoted to senior management positions. Thus, the decline in mean age is not attributable to senior managers being fired; it is attributable to younger employees moving into newly created senior management positions.

Even if we infer a general animus toward older people currently occupying senior management positions, Appellant offers no evidence providing for a reasonable inference

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[7] Deposition of Walter Stafford, 6R. Plaintiff's App. 146.

connecting the Plan to his own termination. Appellant argues that the "grey hair" and "generation skipping" comments tie the Plan to his termination. The Plan was in place before the road show; thus, it could not have been enacted in response to the "grey hair" comment. Appellant's argument that we should consider the Plan as being enacted in anticipation of the comments requires an unreasonable inference, which we are not required to make. Similarly, the "generation skipping" comment, spoken in connection with a promotion decision made by someone other than the speaker, can be linked to the Plan and to Appellant's termination only with unreasonable inferences.

We reject also Appellant's argument that he was treated differently from Jeff Langdon, whose management style had been the subject of complaints from subordinates. In discrimination cases, we compare the treatment of other employees whose conduct is "nearly identical" to the plaintiff's conduct and who were treated more favorably than the plaintiff. *Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F.3d 507 (5th Cir.2001). Appellant cannot show that Langdon's conduct was nearly identical because no formal complaint of gender discrimination was filed against Langdon. Thus, as the district court concluded, Appellant's treatment cannot be compared with that of Langdon.

Finally, Appellant points to Appellee's alleged lax attitude toward sexual harassment and discrimination. Appellant's evidence of the Company's attitude is no more than a list of the employees who have made complaints and a judgment against the Company won by one complainant. The record contains no evidence of the substance of the complaints or action taken by the Company that would be probative of the Company's attitude toward sex discrimination. No reasonable inference that the Company acted differently in its response to Appellant can be drawn from evidence in the record.

Viewing the evidence as a whole and drawing all reasonable inferences in Appellant's favor, we find that he has created no issue of material fact regarding the Appellee's discriminatory animus in terminating him. We therefore affirm the judgment of the district court.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

[Filed Jun 4, 2001]

KENNETH D. SANDSTAD,

Plaintiff,

v.

CB RICHARD ELLIS, INC.

Civil Action No. 3-99-CV2352-P

MEMORANDUM OPINION AND ORDER

Now before the Court are the following:

1. Motion for Summary Judgment of CB Richard Ellis, Inc., Brief in Support, and Appendix, all filed on December 5, 2000;

2. Plaintiff Kenneth D. Sandstad's Response in Opposition to Defendant's Motion for Summary Judgment, Brief in Support and Appendix, all filed on December 22, 2000;

3. Plaintiffs Objections to and Motion to Strike Certain Portions of Defendant's Summary Judgment Evidence, filed December 22, 2000;

4. Defendant's Response to Plaintiffs Objections to and Motion to Strike Certain Portions of Defendant's Summary Judgment Evidence filed January 12, 2001;

5. Defendant's Objections to and Motion to Strike Portions of Plaintiff s Evidence in Response to Defendant's

Summary Judgment Motion, and Brief in Support, filed January 19, 2001;

6. Plaintiffs Reply Brief in Support of His Objections to and Motion to Strike Certain Portions of Defendant's Summary Judgment Evidence, filed January 24, 2001;

7. Plaintiffs Response to Defendant's Objections to and Motions to Strike Portions of Plaintiffs Evidence in Response to Defendant's Summary Judgment Motion and Brief in Support, filed on February 8, 2001;

8. Defendant's Reply Brief to Plaintiffs Response to Defendant's Objections to and Motion to Strike Plaintiff' Evidence, filed February 23, 2001;

9. Plaintiff's Submission of Original Signature Page to Supplemental Declaration of Kenneth D. Sandstad, filed March 12, 2001;

10. Plaintiff Kenneth D. Sandstad's Amended and Supplemental Expert Witness Report, filed on March 30, 2001.

For the reasons stated below, Defendant's motion for summary judgment is GRANTED. Because the Court has not relied on the evidence Plaintiff and Defendant object to, it need not consider plaintiffs and defendant's motions to strike evidence.

I. STATEMENT OF FACTS

Defendant CB Richard Ellis, Inc. (hereinafter "CBRE") is a real estate services company that provides services in the commercial real estate industry, including sales and leasing, valuation, consulting, asset services, property management,

facilities management, mortgage banking and investment advisory services.[1]

Plaintiff Kenneth D. Sandstad, born on May 22, 1946, began employment with Defendant in July of 1974. Plaintiff held many and various positions during his tenure at CBRE. These varied positions included: 1) vice president and resident manager of CBRE's Minneapolis/St. Paul office; 2) first vice president and resident manager of CBRE's North Dakota office; 3) South Central Regional manager, Brokerage Services; 4) Central Division manager, brokerage services; 5) National Focus Client Leader; and 6) Eastern Division Manager, Brokerage Services. Plaintiff also held other positions and duties, such as being a Member of the Board of Directors for CB Canada, Member of the Board of Directors for CB Commercial and leading Defendant's Portfolio Services. Defendant fired plaintiff when plaintiff was 52 year old.

Some of the facts pertinent to this lawsuit are as follows: In November of 1995, plaintiff received a negative performance review from Dick Clotfelter, plaintiff's supervisor. This negative review was primarily based on plaintiffs management style, yet apparently did not prevent plaintiff from continuing to "rise" within the company. In November of 1996, defendant became a publicly traded company. As part of this process, defendant held an Initial Public Offering Roadshow in October and November of 1996. In connection with the preparation for the Roadshow, defendant prepared a "Potential Road Show Questions and Answers" for the road show participants. On page 18 of this document, the following potential question and prepared answer appear:

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[1] CBRE was formerly known as CB Commercial Group, Inc. A merger in 1998 resulted in the name change to CBRE. This Court will use CBRE to refer to Defendant and to its predecessor entities.

> Q: Do you have any plans to integrate younger employees into the management team? If so, when?
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> A: We have a very clear plan to integrate younger employees into the senior management team. As a matter of fact, we have embarked on a long term leadership program with identified people and are consistently training our younger people for assumption of long-term leadership responsibilities.

See Plaintiffs appendix at 344.

Indeed, during the Roadshow, several analysts did comment that they were concerned there was "too much gray hair" among defendant's senior managers. Walter Stafford, a supervisor at CBRE, expressed concern about the analysts' opinions and stated he would have to take action regarding those concerns. Prior to the roadshow, however, defendant had already begun to create a plan called the Long-Term Leadership Orientation Program (the "LDP"). Prior to the Roadshow, in a memorandum dated October 1, 1996, then CEO James Diction, wrote that the purpose of the leadership program was to "identify and orient promising and committed young managers for long-term leadership roles within the company." Diction again wrote in a memo dated October 17, 1997:

> The objective [of the Plan] was, and is, to identify 30 to 50 younger managers and management candidates to serve as a pool of talent for promotion to senior management positions over the next 5+ years, ultimately replacing current senior management.

Plaintiff's appendix at 317, 349.

In early 1998, CBRE eliminated the Eastern and Western Divisions, created nine separate regions and assigned plaintiff to the lead management role in the South Central Region. In March of 1998, Jerry Lumsden, a manager in the Austin

office, sent Brett white, plaintiff's superior, a memorandum detailing Lumsden's frustration with plaintiff's leadership and behavioral style. In May of 1998, white reviewed plaintiff's performance and expressed concerns regarding instability of the management team and under-performance of the Dallas market, which plaintiff oversaw.

In August of 1998, Nina Petty, a female working under plaintiff, filed a formal written complaint of gender discrimination against plaintiff. Defendant hired outside counsel to investigate Petty's claim. This investigation consisted of eight interviews of various employees and a review of selected documents. Plaintiff has objected to these interviews on the basis of double hearsay. CBRE responds that the interview summaries are not hearsay because they are offered to show CBRE's state of mind and to show that CBRE was aware prior to the termination of issues concerning Sandstad's management style. The court agrees. As explained later in this opinion, the issue is not whether Sandstad actually discriminated against Petty, but whether the evidence shows a reasonable basis for CBRE to have believed that Sandstad's conduct placed the company at legal risk. Thus, the interview summaries are offered not for the truth expressed by the employees, but to show that CBRE conducted an investigation and that it had a reasonable basis for believing that Sandstad's conduct placed the company at risk.[2]

The gender discrimination alleged against plaintiff consisted of the following: 1) plaintiff selected a man for a senior management position without interviewing Petty, who had more experience; 2) plaintiff asked Petty to come to the office while she was on maternity leave and informed her she should consider a job in production, rather than management;

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[2] The court notes that it would reach the same decision in this case if the interview summaries are not considered.

3) plaintiff excluded Petty from a team of managers to assist in the redesign of the operations of the South Central Region; 4) plaintiff referred to Petty as "mother hen."

On September 14, 1998, CBRE discharged plaintiff. His superior informed him that his performance had been unacceptable, his management style counter-productive, that he had lost support from his management team and that he had placed the company at great risk by his conduct toward Petty.

III. SUMMARY JUDGMENT STANDARD

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). All evidence and the reasonable inferences to be drawn therefrom must be viewed in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962). The moving party bears the burden of informing the district court of the basis for its belief that there is an absence of a genuine issue for trial, and of identifying those portions of the record that demonstrate such an absence. Celotex, 477 U.S. at 323.

Once the moving party has made an initial showing, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). The party defending against the motion for summary judgment cannot defeat the motion unless he provides specific facts that show the case presents a genuine issue of material fact, such that a reasonable jury might return a verdict in his favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Mere

assertions of a factual dispute unsupported by probative evidence will not prevent summary judgment. *Id.* at 248-50; *Abbot v. Equity Group, Inc., 2* F.3d 613, 619 (5th Cir.1993). In other words, conclusory statements, speculation and unsubstantiated assertions will not suffice to defeat a motion for summary judgment. *Douglass v. United Servs. Auto.* Ass'n, 79 F.3d 1415, 1429 (5th Cir.1996) (*en bane*). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case, and on which he bears the burden of proof at trial, summary judgment must be granted. *Celotex,* 477 U.S. at 322-23.

Finally, the Court has no duty to search the record for triable issues. *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 403 (6th Cir.1992). The Court need only rely on the portions of submitted documents to which the non-moving party directs. *Id.*

IV. DISCUSSION

Age Discrimination Claim

The Age Discrimination in Employment Act ("the ADEA") provides the following:

> (a) It shall be unlawful for an employer—
>
> > (1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age. . . .

29 U.S.C.A. §623 (a)(1) (1999).

Claims brought under the ADEA are subject to the same analytical framework set out by the United States Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and later elaborated upon in St. *Mary s Honor Center v. Hicks*, 509 U.S. 502 (1993). *See O'Connor v. Consolidated*

Coin Caterers Corp., 517 U.S. 308, 311(1996); *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 n.4 (5th Cir.1993).

If the plaintiff can show the employer intentionally violated the ADEA, then he may prevail in an age discrimination lawsuit. The plaintiff may show intentional discrimination either through direct or indirect evidence of discrimination. *Price v. Marathon Cheese Corp.*, 119 F.3d 330, 336 (5th Cir. 1997). Direct evidence is evidence that proves the defendant acted with discriminatory intent, without the need for inference or presumption. *Mooney v. Aramco Serv. Co.*, 54 F.3d 1207, 1217 (5th Cir.1995). If direct evidence is unavailable to a plaintiff and the plaintiff uses indirect, circumstantial evidence of discrimination, the evidence must be such "as to allow a rational fact finder to make a reasonable inference that age was a determinative reason for the employment decision." *Scott v. University of Mississippi*, 148 F.3d 493, 504 (5th Cir.1998).

To create an inference of discrimination, the plaintiff must first present a prima facie case, which establishes a rebuttable presumption of discrimination. Price, 119 F.3d at 336. To establish a prima facie case of age discrimination, the plaintiff must show that he was "(1) discharged; (2) qualified for the position; (3) within the protected class; and (4) either (i) replaced by someone outside the protected class, (ii) replaced by someone younger, or (iii) otherwise discharged because of his age." *Id.* at 336-37.

Once the plaintiff shows the foregoing, then the defendant must offer a legitimate, nondiscriminatory reason for its decision to discharge plaintiff. *Id.* at 337. If he does so, the burden then shifts to the plaintiff to show by a preponderance of the evidence that the reason proffered by the employer is pretextual. *Id.* To show pretext for unlawful discrimination, the plaintiff cannot simply rely on a subjective belief that discrimination occurred; he must prove "that age actually played a role in and had a determinative influence on the

employer's decision-making process." *Id.* (internal quotations omitted).

1. *Direct Evidence*

Direct evidence in the Fifth Circuit is evidence which proves that the defendant acted with discriminatory animus without any inference or presumption. *Mooney v. Aramco Serv. Co.*, 54 F.3d 1207, 1217 (5th Cir.1995). If a plaintiff does show direct evidence of discrimination, the burden of proof then shifts to the defendant who must then show by a preponderance of the evidence that the employment decision would have been made regardless of discriminatory intent. If the defendant cannot show this, the employee prevails. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249 (1989); Mooney, 54 F.3d at 1217.

In this case, Sandstad attempts to show direct evidence of discrimination through evidence of age-related remarks. "[R]emarks may serve as sufficient evidence of age discrimination if the offered comments are: 1) age related; 2) proximate in time to the terminations; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue." *Brown v. CSC Logic, Inc., 82* F.3d 651, 655 (5th Cir.1996). For a remark to be probative of discriminatory intent, it must be "direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was an impermissible factor in the decision to terminate the employer." *EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173,1181(5th Cir.1996).

Plaintiff maintains that as a result of the discriminatory comments CB officials received during the IPO roadshow, CB embarked on its plan to replace senior managers with younger managers. The evidence shows that during the roadshow, some attendees commented that "the management team had too much gray hair," that Stafford was concerned

about these comments, that Stafford told plaintiff he would have to deal with these age-related concerns, that CB prepared potential questions and answers regarding the age of CB's senior management,[3] that CB initiated a plan to train younger people for assumption of long-term leadership roles, and that

Diction wrote in a memo:

> The objective [of the Plan] was, and is, to identify 30 to 50 younger managers and management candidates to serve as a pool of talent for promotion to senior management positions over the next 5+ years, ultimately replacing current senior management.

Plaintiffs "direct evidence" is problematic for several reasons. First, the comments made during the IPO roadshow were not made by an individual with authority over the employment decision at issue. The people commenting were not employed by defendant (i.e., they had no legal relationship with defendant) and therefore their remarks cannot be considered as direct evidence of age-related remarks. Moreover, the IPO comments are not proximate in time to the terminations, having been made approximately two years before plaintiff's termination. The evidence also shows the LDP was developed prior to these comments having been made at the roadshow, not subsequent to. Plaintiffs "direct evidence" requires too many inferences and presumntions.

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[3] "We have a very clear plan to integrate younger employees into the senior management team. As a matter of fact, we have embarked on a long-term leadership program with identified people and are consistently training our younger people for assumption of long-term leadership responsibilities." Plaintiffs appendix at 344.

The potential questions prepared by Stafford and the memo written by Diction also do not qualify as "evidence." The questions were prepared approximately two years before plaintiff's termination. The memo was written approximately one year before plaintiff's termination. Again, these comments are not proximate in time to the termination Second; these memos and questions can be interpreted as merely saying defendant needs to train younger employees to replace the older ones once the older managers retire just as easily as they can be interpreted as saying that defendant is trying to "get rid" of older employees. Therefore, this "direct evidence" requires inferences and presumptions that this Court cannot make when it is considering "direct evidence."

Finally, plaintiff attempts to show that because the participants in the LDP were younger than the senior managers, that this is direct evidence of discrimination. However, the purpose of the plan was to train younger employees to eventually replace the older ones - therefore, the fact that the LDP participants were "younger" is no great surprise. Existing senior managers could not be considered as potential participants in the LDP since they are already managers; therefore, this evidence does not qualify as "direct evidence" of age discrimination. Plaintiff also fails to offer any expert evidence that the reduction in the average age of senior management occurred as a result of discrimination against any existing senior managers. Indeed, the evidence shows that only two senior managers have been fired since the four years the LDP Was announced - plaintiff and another man, whom plaintiff admits was fired for making inappropriate comments during a public meeting. *See* defendant's appendix at 2; supplemental appendix at 5-6. The evidence also shows that from September 1995 to September 2000, fifteen new individuals were added to defendant's senior management team in the United States, six participated in the LDP but only one replaced a member of senior management, who, as stated above, was fired for

inappropriate comments. *See* defendant's appendix at 2-3. The other five participants in the LDP either filled newly created positions or replaced an employee who remained a member of senior management, but in a different capacity. *See id.* at 3. The promotion of the six participants from the LDP into senior management did not result in the termination of existing senior management. *See id.* Therefore, the court finds that the implementation of the LDP does not constitute direct evidence of defendant's discrimination against older employees.

2. Indirect Evidence

As previously stated, to establish a prima facie case of age discrimination, plaintiff must show that 1) he was discharged, 2) qualified for the position, 3) within the protected class, 4) replaced by someone outside the protected class, someone younger or he was discharged because of his age. *Russell v. McKinney Hospital Venture, 235* F.3d 219 (5th Cir. 2000).

Only the fourth element is disputed in this case. Plaintiff cites evidence that Langdon, a younger person, took over plaintiffs responsibilities. *See* plaintiffs appendix at 549, 416-417, 367-368, 433-434 and 446-447. Defendant cites evidence that Langdon did not replace plaintiff but that Defendant combined the South Central Region and the Inter-Mountain Region and when this consolidation took place plaintiff wasn't replaced by Langdon, but simply the leadership of the regions was consolidated. *See* plaintiffs appendix at 417.

For summary judgment purposes, the court will presume that plaintiff did establish a prima facie case since the evidence must be viewed in a light most favorable to the plaintiff. Assuming, then, that plaintiff did establish a prima facie case, defendant is nevertheless entitled to summary judgment because defendant offered a legitimate, nondiscriminatory reason for plaintiff's discharge: White,

plaintiff's superior, lost confidence in plaintiff's ability to perform his duties as the South Central Region Manager.

The evidence shows that the loss of confidence was based on two factors: the situation with Nina Petty and plaintiff's management style. Nina Petty was a female employee who filed a complaint with the company against plaintiff for gender discrimination. The evidence shows that defendant feared that plaintiffs actions towards Petty exposed the company to substantial legal risk. This is a legitimate, nondiscriminatory reason for discharging plaintiff.

Plaintiff maintains that these reasons are pretextual. Pretext is shown by admissible evidence of specific facts showing the employer's reason is contrived. *Berg v. Bruce,* 112 F.3d 322, 327 (8th Cir.1997). "[T]he burden of establishing [the nondiscriminatory reasons] as pretextual is a heavy one indeed. It is no discharged by general avowals of belief, however sincere [discrimination] rather than an established aquate reason-was the real reason for the termination." *Gizzle v. Health Network, Inc.* 3d 261, 268 (5th Cir.1994.

Plaintiff first argues that because he did not actually discriminate against Petty, that defendant's reason is pretextual. However, whether plaintiff actually discriminated against Petty, is not the issue. Even assuming that plaintiff did not discriminate against Petty does not answer the question of whether CBRE had a reasonable belief that Sandstad's conduct had exposed the company to significant legal risk. The undisputed fact remains that Petty filed a complaint with defendant against plaintiff for gender discrimination. Moreover, the evidence supports defendant's claim that following an investigation, defendant feared legal exposure due to this complaint. It is sufficient that the defendant reasonably believed the complaint exposed it to legal liability. "Even an incorrect belief that an employee's performance is inadequate constitutes a legitimate, non-discriminatory reason. We do not try in court the validity of good faith belief

as to an employee's competence. Motive is the issue." *Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir. 1991). Plaintiff maintains that because defendant reasonably believed the complaint exposed it to legal liability. "Even an incorrect belief that an employee's performance is inadequate constitutes a legitimate, non-discriminatory reason. We do not try in court the validity of good faith belief as to an employee's competence. Motive is the issue." *Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir.1991). Plaintiff maintains that because defendant's outside investigator, Rogge Dunne, did not believe that Sandstad discriminated against Petty, defendant could not really have believed that plaintiff discriminated against Petty. However, Mr. Dunne also informed *CBRE that* he believed Petty would likely prevail if she filed suit against the defendant. Thus, CBRE had a reasonable basis for its belief that plaintiffs conduct toward's Petty placed the company in a position of substantial legal risk.

Second, 'plaintiff states that defendant's reason is pretextual because defendant tolerated sex discrimination. Plaintiff shows no evidence of defendant's tolerance of sex discrimination other than to refer the court to a judgment obtained against defendant for sex discrimination. This judgment, wholly unrelated to this case, is not evidence that the reason given in this case is a pretext. Moreover, plaintiff asserts that there were 13 complaints of gender discrimination against managers within the company and only two were fired because of those complaints. This assertion is equally ineffectual as evidence of pretext because plaintiff does not present evidence to show whether or not defendant considered that the other complaints placed the company at Substantial legal risk, as it did in this case.

Finally, plaintiff maintains that defendant's change in its rationale for termination is further evidence of pretext. Plaintiff asserts that in the Notice of Personnel Action

("NOPA") and White's accompanying memo, in response to Sandstad's interrogatories, in the meeting in which Sandstad was terminated, and in the reasons given to Nina Petty defendant never articulated a concern that plaintiff had placed the company at substantial legal risk. The evidence, however, does not support plaintiff's assertion. In the memo accompanying the NOPA, white stated that his decision to terminate plaintiff "was made following a lengthy and thorough investigation of a charge of gender discrimination lodged against Ken by a female employee . . . ." Defendant's answers to Sandstad's interrogatories repeated this statement. Thus, while neither white's memo or the answers to interrogatories used the phrase "placed the company at substantial legal risk", it is apparent that the gender discrimination complaint was a factor in defendant's decision to terminate Sandstad. As plaintiff notes, the memo reflecting what was said at the meeting in which Sandstad was terminated states that Petty's complaint was "considered in the decision but it was not the determining factor." The very next sentence, however, states that Sandstad's actions "were inappropriate and have placed the company at substantial risk if she [Petty] were to bring suit against the company for gender discrimination." Thus, it is apparent that from the beginning CBRE believed that Sandstad's conduct placed it at risk legally. As discussed above, the evidence supports the reasonableness of that belief.

Finally, that in response to a concern expressed by Petty, CBRE told Petty that her complaint had little to do with plaintiff's termination is not sufficient to raise an issue of pretext. In considering the evidence, it becomes apparent that defendant's reasons for terminating plaintiff have not changed and thus provide no evidenced pretext.

With respect to plaintiff's management style plaintiff contends that the evidence does not support defendant's claim of concerns it had with plaintiffs management style prior to

the termination. However, the defendant has presented evidence of concern with plaintiff's management style prior to the September 1998 termination. Plaintiff received a review in 1995 that indicated concerns with his management practices. Plaintiff's 1998 performance review also reflects concerns about plaintiff's management style, and a memo plaintiff wrote to defendant indicated he knew of the complaints regarding his management style.[4] *See* plaintiff's appendix at 271. That White ultimately gave plaintiff good performance reviews does not change the fact that concerns about plaintiffs management style were being voiced well before the termination. Thus, there is sufficient evidence to show that defendant, prior to the termination, had concerns over plaintiffs management style and that it factored into the decision to ultimately terminate plaintiff.

Plaintiff's argument hat there was disparate treatment between him and Jeff Langdon is not viable here his situation was not "nearly identical" to Langdon's. *See Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir. 1991). Plaintiff complains that Langdon's managers complained about Langdon's management style and defendant did not fire Langdon. However, this situation is not nearly identical to plaintiff's in that no one lodged a complaint against Langdon for gender discrimination. Therefore, this argument fails.

The Court finds that the plaintiff has failed to present direct evidence of age discrimination and that defendant has rebutted plaintiff's prima facie case by showing a legitimate, nondiscriminatory reason for plaintiff's termination.

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[4] "Brett commented that there were several concerns that had been expressed that are part of the `book' on me:.... concern over hiring mangers who are better lieutenants than leaders.. . spending more time than I should on details." Plaintiffs appendix at 8.

CONCLUSION

Based on the foregoing, the Court is of the opinion that defendant has offered a legitimate, nondiscriminatory reason for plaintiff's termination and defendant's motion for summary judgment should be GRANTED.

So Ordered.

Signed this___day of June, 2001

/s/ Jorge A. Solis
Jorge A. Solis

UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed June 5, 2001]

NO. 3:99-CV-2352-P

KENNETH D. SANDSTAD,

Plaintiff,

v.

CB RICHARD ELLIS, INC.,

Defendant.

FINAL JUDGMENT

Pursuant to the Court's Memorandum Opinion and Order filed June 4, 2001 the Court issues judgment as follows:

It is ORDERED ADJUDGED and DECREED that,

1. Plaintiff Kenneth D. Sandstad, shall take nothing from his claims against defendant CB Richard Ellis, Inc.

2. Accordingly, costs incurred by the defendant, shall be assessed against plaintiff.

TO IS SO ORDERED.

Signed this 5th day of June, 2001 at Dallas, Texas.

/s/ Jorge A. Solis
Jorge A. Solis

UNITED STATES
DISTRICT JUDGE
NORTHERN DISTRICT
OF TEXAS

APPENDIX C

Sec. 621.—Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment

Sec. 622.—Education and research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older

workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures—

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631of this title

Sec. 623.–Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a

foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such

actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub. L. 101-239, title VI, Sec. 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof

to establish or maintain an employee pension benefit plan which requires or permits—

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section

1056(a)(3) of this title and section 401(a)(14)(C) of title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preced ing provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the

subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m) of this section..[1]

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 and subparagraphs (C) and (D) of section 411(b)(2) of title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of title 26.

(9) For purposes of this subsection—

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of title 26.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer

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[1] So in original.

has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained—

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B) (i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of—

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section—

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because—

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for—

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42U.S.C. 401 *et seq.*), and that do not exceed such old-age insurance benefits.

(2) (A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age—

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii); are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of title 26) that—

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)—

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 *et seq.*);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E) (i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year

for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)—

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(B) of this section, it shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because a plan of an institution of higher education (as defined in section 1001 of title 20) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if—

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election

Sec. 624.—Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

(a) (1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include—

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631(a) of this title to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 631(c) of this title, relating to certain executive employees, and the exemption contained in section 631(d) of this title, relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982

Sec. 625.—Administration

The Secretary shall have the power—

(a) Delegation of functions; appointment of personnel; technical assistance to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

(b) Cooperation with other agencies, employers, labor organizations, and employment agencies to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

Sec. 626.—Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid

overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or

participate in an investigation or proceeding conducted by the Commission

Sec. 627. - Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter

Sec. 628. - Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest

Sec. 629. - Criminal penalties

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Equal Employment Opportunity Commission while it is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: Provided, however, That no person shall be imprisoned under this section except when there has been a prior conviction hereunder

Sec. 630. - Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trust, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or

their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended (29 U.S.C. 151 et seq.), or the Railway Labor Act, as amended (45 U.S.C. 151 *et seq.*); or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters

thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401 *et seq.*).

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331 *et seq.*).

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan

Sec. 631.—Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633aof this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any

combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made

Sec. 633.—Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one

hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority

Sec. 633a.—Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action

on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on

the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be

subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980

Sec. 634.—Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out this chapter

APPENDIX D

Rule 56. Summary Judgment

(a) For Claimant.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion.

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by

examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable.

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a

continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.